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Cooperation with National Systems

JEFFREY L. BLEICH*

This report concerns the provisions of the International Law Committee (ILC) Draft Statute of the International Criminal Court (ICC) regarding cooperation between the ICC and national jurisdictions. The comments of the Working Group are intended to stimulate discussion of the relevant Draft provisions and are not intended to reflect any formal conclusion of the International Law Association (ILA) Working Group.

I. BACKGROUND

For purposes of evaluating the current ILC Draft, the term "cooperation between the court and national jurisdictions" has a limited meaning. Cooperation between the court and national jurisdictions is, of course, implicated by virtually every provision of the Draft ILC Statute. With respect to this report, and the report of the Preparatory Committee, consideration is limited only to affirmative acts of judicial assistance by States in furtherance of the Court's jurisdiction. Specifically, these acts of cooperation involve assistance by States in conducting ICC investigations, facilitating trial, and executing the Court's sentence.

The principal issues raised by the "cooperation" provisions of the ILC Draft are:

1. Whether the ICC should have authority to conduct independent investigations and compel the cooperation of States to assist in those investigations consistent with the principle of "complementarity?"
2. Whether the ICC should have authority to compel States to arrest, detain, and transfer suspected criminals notwithstanding that state's obligations under domestic law or with regard to extradition treaties?
3. To the extent that the ICC may override some traditional limitations on extradition, what bases, if any may, a State raise for not transferring a person subject to an ICC arrest warrant?
4. What "supervisory jurisdiction," if any, will the ICC have to assist States in matters where the ICC has concurrent jurisdiction, has

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deferred to the jurisdiction of the national courts, and has been called upon by that nation to assist?

5. What mechanism, if any, should be employed for effectuating an ICC request in cases in which the State from which assistance is sought does not have a functioning judicial system?

These issues are addressed below.

II. THE ILC DRAFT STATUTE

As explained below, cooperation by individual States in assisting the Court is implicated principally by Articles 26 (investigation of alleged crimes), 28 (arrest), 29 (pre-trial detention and release), 31 (persons made available for prosecution), 51 (cooperation and judicial assistance), 52 (provisional measures), 53 (transfer of an accused), 54 (obligation to extradite or prosecute), 55 (rule of specialty), 56 (cooperation with States not parties), 57 (communications and documentation), 58 (recognition of judgments), and 59 (enforcement of judgments).¹

In general, the Draft was intended to promote flexibility — not to require “*complete* reliance upon national law and practices.”² Nevertheless, consistent with the principle of “complementarity,” the Draft Statute seeks to maximize reliance upon voluntary cooperation with the Court by utilizing official government organs, and avoiding initiation of an investigation within a State’s territory against that State’s wishes.³ Likewise, although the Draft provides the ICC with extensive powers to require States to assist in the arrest and transfer of suspected criminals, it limits the scope of this authority based upon whether the State party has accepted the Court’s jurisdiction with respect to a specific crime.

A. Investigation

Articles 26, 51, and 52 provide for cooperation between States and the prosecutor with respect to the investigation of alleged crimes. Article 26 provides that the prosecutor has the authority to detain and question suspects, victims, and witnesses (subsection (2)(a)), collect physical evidence (subsection 2(b)), conduct on-site investigations (subsection 2(c)), protect individuals from intimidation (subsection 2(d)),

1. See *Report of the International Law Commission on the Work of its Forty-Sixth Session*, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994) [hereinafter 1994 ILC Draft].

2. See *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 50th Sess., Supp. No. 22, at 38, ¶199, U.N. Doc. A/50/22 (1995) (emphasis added) [hereinafter *Ad Hoc Comm. Report*].

3. *Id.* at 37, ¶ 197 (“[O]nly in limited circumstances, where national jurisdiction failed to provide such assistance, would the question of the court’s direct exercise of its investigative powers in the territory of the State, either on its own or through agents of the State acting on its behalf, arise.”).

and "as appropriate, seek the cooperation of any State or of the United Nations" (subsection 2(e)).⁴

Article 51 provides that "States parties *shall* cooperate with the Court in connection with criminal investigations and proceedings under this Statute."⁵ The Article enumerates a non-exclusive list of duties of States, including assistance in the identification and location of persons (subsection 2(a)), collection of evidence (subsection 2(b)), and service of process (subsection 2(c)). Once a request has been made, the States parties "shall respond without undue delay to the request."⁶ Article 52 clarifies that this may entail requiring the State to take provisional measures, such as seizing evidence or otherwise preserving evidence or witness testimony.⁷ The prosecutor's requests for assistance may be made informally, provided that the prosecutor follows up with a formal, written request "as soon as possible."⁸ Evidence provided by the State may not be used in prosecution or punishment of any other crime without the State's consent.⁹

B. *Arrest and Pre-Trial Detention*

Article 28 provides that the Presidency may, at the request of the prosecutor, issue a warrant for the provisional arrest of a suspect.¹⁰ Because the ICC Statute does not contemplate a separate police force, execution of the warrant is accomplished through the cooperation of the State in which the suspect then resides.¹¹ Accordingly, pursuant to a warrant, the Court may request a State to provisionally arrest¹² and detain that suspect pending transfer to the Court.¹³

The circumstances of an arrest under Article 28 are subject to review by a judicial officer of the State where the arrest occurred.¹⁴ At the hearing, the judicial officer has authority to determine only whether the warrant has been duly served, and the rights of the accused have been respected.¹⁵ If the arrest is deemed valid, then the State in which the arrest took place, or where the trial will occur, is expected to hold the person in an appropriate place of detention.¹⁶

4. Article 26 also provides that if the prosecutor decides not to pursue a prosecution, a complainant state may seek review of that decision by the Presidency of the ICC. 1994 ILC Draft, *supra* note 1, art. 26(5).

5. *Id.* art. 51(1) (emphasis added).

6. *Id.* art. 51(3).

7. *Id.* art. 52(1).

8. *Id.* art. 52(2).

9. *Id.* art. 55.

10. *Id.* art. 28(1).

11. *Id.* art. 51(1), 51(2)(d).

12. *Id.* art. 52(1)(a).

13. *Id.* art. 53.

14. *Id.* art. 29(1).

15. *Id.*

16. *Id.* art. 29(4).

Under Article 53, all States must cooperate in arresting and transferring individuals pursuant to a warrant relating to the crime of genocide.¹⁷ A State which has accepted the jurisdiction of the Court with respect to the crime in question must also comply with the Court's request for arrest and transfer, as well as give priority to a request by the Court over requests from other States.¹⁸ A State party which is a party to a treaty establishing an international crime, but which has not accepted the Court's jurisdiction with respect to that crime, is required either to transfer the accused voluntarily, or to take all necessary steps to extradite the accused.¹⁹ In all other cases, although the State party must consider taking these steps, its obligation to extradite or transfer the accused is limited by domestic laws.²⁰

C. *Prosecution*

Pursuant to Article 31, "[t]he prosecutor may request a State party to make persons available to assist in a prosecution."²¹ Persons ordered to assist in an ICC prosecution are required to follow the direction of the prosecutor, notwithstanding contrary requests by their respective Governments.²²

D. *Recognition and Enforcement of Judgments*

Article 58 provides that States parties recognize the judgments of the Court. Article 59 clarifies that not only must States give full faith and credit to Court judgments, but also they must assist in the enforcement of these judgments. Thus, the Court may sentence convicted criminals to confinement in the prisons of States that have volunteered to accept prisoners for incarceration.²³ The effectuation of the sentence, however, remains subject to the supervision of the Court and in accordance with Court rules.²⁴

III. GENERAL CONCERNS REGARDING THE CURRENT DRAFT

The ILC's provisions regarding State cooperation have been criticized for: (1) abridging the notion of complementarity by giving primacy to the ICC over decisions to investigate; (2) altering the traditional system of apprehension and surrender under international law; (3) failing to specify the bases for a State's refusal to extradite or transfer a person subject to an ICC arrest warrant; (4) and failing to

17. *Id.* art. 53(2)(a)(i).

18. *Id.* art. 53(2)(a)(ii).

19. *Id.* art. 53(b), art. 54.

20. *Id.* art. 53(c). States not parties to the ICC Statute may assist the ICC based upon unilateral or *ad hoc* consent. *Id.* art. 56.

21. *Id.* art. 31(1).

22. 1994 ILC Draft, *supra* note 1, art. 31(2).

23. *Id.* art. 59(1).

24. *Id.* art. 59(3).

address additional issues regarding re-extradition, residual supervisory authority, and judicial assistance where the national judicial system was no longer functioning. While other concerns may be presented by the cooperation provisions of the Draft, absent a complaint by States parties, those concerns have not been raised in this report.

A. State Assistance in the Investigation Of Crimes And Complementarity

Some nations have complained that the ILC Draft makes it too easy for the prosecutor to initiate an investigation, thereby potentially imposing the Statute's cooperative obligations upon States parties. Israel, for example, has proposed that in order to initiate an investigation "charges . . . must be filed not by one country alone but by a large and diverse group of countries, showing that the issue is one which has, indeed, aroused the wrath of a significant portion of the world."²⁵

Although the United States has not gone quite as far as Israel, it proposes that Articles 25-27 be amended to give States standing to object to any investigation by the ICC prosecutor that might interfere with a legitimate national investigation or prosecution.²⁶ The United States thus proposes that a State be permitted to prevent an investigation by the ICC prosecutor, by showing that a "full," "adequate," or "bona fide" investigation is proceeding, or will proceed, in that State forum.²⁷ As noted in the Working Group's report on complementarity, the United States seems to prefer either limiting the prosecutor's ability to commence an investigation without the consent of interested States, or adding some sort of independent review by an entity other than the ICC or prosecutor, regarding the need for an ICC investigation. The United States thus advocates an automatic stay of jurisdiction while a State conducts a bona fide investigation.²⁸

At the same time that the United States and other nations propose increasing restrictions on the ICC's capacity to initiate an action, some other nations advocate easing *any* restriction upon the prosecutor's ability to go forward with an investigation.²⁹ As the New Zealand

25. Statement of H. Golan (Israel) to U.N.G.A. 6th Comm., U.N. GAOR, 50th Sess., U.N. Doc A/C.6/50/SR (1995).

26. See *United States Comments to Ad Hoc Committee Report*, U.N. GAOR, 50th Sess., at 19, 20, U.N. Doc. A/AC.244/1/Add.2 (1995) [hereinafter *United States Comments*].

27. *Id.* at 10.

28. *Id.* at 18. The *Ad Hoc* Committee reports note a suggestion, possibly by the United States, that the prosecutor should suspend investigation, and that the ICC suspend jurisdiction, immediately once an interested state informs the Court that it is conducting its own *bona fide* investigation. *Ad Hoc Comm. Report, supra* note 2, at 10, ¶ 51.

29. See Statement of F. Wong (New Zealand) to U.N.G.A. 6th Comm., U.N. GAOR, 50th Sess., at 9, ¶ 43, U.N. Doc A/C.6/50/SR (1995) ("the prosecutor should be able to investigate and prosecute cases on his or her own initiative.").

delegation explained: "It would [sic] completely inadmissible if the Security Council was able to prevent the Court from exercising its jurisdiction by simply claiming it had already been 'seized' of the matter."³⁰

Accordingly, a tension exists between the notion of complementarity, which establishes the primacy of national jurisdictions in investigating and prosecuting international crimes, and the possibility that the ICC may require States to conduct an ICC investigation and to provide other judicial assistance before that State has had an opportunity to challenge the Court's authority.

B. Easing of Traditional Principles Concerning State Assistance in the Apprehension, Detention, and Transfer of Suspected Criminals

As several States have noted, Article 53 — the Article which directly concerns State obligations to apprehend, detain, and transfer suspected criminals — represents a significant departure from the traditional system of State extradition. Rather than incorporating limitations of general treaty provisions among States parties, Article 53 imposes a new strict transfer scheme. This scheme limits the role of national courts in evaluating the grounds for arrest and extradition by restricting review only to the adequacy of service, and the validity of the procedures surrounding the arrest under domestic law. Moreover, Article 53 establishes a presumption in favor of transfer to the Court over simultaneous requests for extradition by other States pursuant to treaty.³¹

The comments of States regarding the system for apprehending, arresting, and transferring suspects reflect a wide divergence of opinion about the wisdom of the ILC Draft approach. Some States suggest that the balance struck by the Draft is appropriate given that the competence of the Court is limited to only the most serious international crimes — those which warrant mandatory international cooperation.³² These States argue that because the crimes over which the ICC would have jurisdiction warrant a coordinated international response, it is appropriate to have a homogenous system that transcends technical differences in treaty law.

Other States, however, argue that, notwithstanding the value of having a homogeneous system, the ICC statute may not properly transcend national constitutional requirements and established practices of existing extradition treaties without violating principles of complementarity.³³ These States appear to favor an "opt-in" provision by which

30. *Id.*

31. *See generally Ad Hoc Comm. Report, supra* note 2, at 39, ¶ 205.

32. *Id.* at 39, ¶ 206.

33. *Id.* at 39, ¶ 205. *See Comments Received Pursuant to Paragraph 4 Of General Assembly Resolution 49/53 On The Establishment Of An International Criminal Court, Ad Hoc Committee On The Establishment Of An International Criminal Court, U.N. GAOR, 50th Sess., at 10, U.N. Doc. A/AC.244/1/Add.2 (1995) (expressing concern of the*

States that accept the jurisdiction of the Court are given the option of either adopting Article 53 or applying traditional extradition procedures.³⁴

Finally, other nations propose various compromises to permit greater "consideration" of national law. The Netherlands, for example, proposes that the ICC should be empowered to invoke national law of the territorial State to deal with questions relating to the types of responsibility, defenses, and other general principles of criminal law to be applied.³⁵

In general, a fragile consensus appears to exist that a balance must be struck between the need for the ICC to transcend traditional extradition-treaty limitations while, at the same time, providing States with some assurance that they may rely upon treaty protections in appropriate cases. As set forth below, the critical area of disagreement appears to be with respect to how that balance will be struck and what grounds may be asserted for refusing to carry out an ICC transfer request.

C. *Bases For Challenging Arrest, Extradition, or Transfer*

The United States has expressed concern that the ILC Draft does not adequately specify which bases are permissible for setting aside a request for judicial assistance.³⁶ As noted, the ILC Draft provides that requests by the Court have priority over requests by nations pursuant to existing extradition agreements, and that the Court ultimately decides whether to invalidate its prosecutor's request for transfer.³⁷ Sev-

United States that extradition provisions of the draft statute "frequently fail to uphold national jurisdiction"); *see also* Statement by I.E. Ayewah (Nigeria) to U.N.G.A. 6th Comm., U.N. GAOR, 50th Sess., at 5, ¶ 19, U.N. Doc. A/C/6.50/SR 29 (1995) ("the strict transfer scheme envisaged in [Article 52], which bypassed national courts, continues to be of concern."); Statement of H. Owada (Japan) to U.N.G.A. 6th Comm., U.N. GAOR, 50th Sess., at 4, U.N. Doc. A/C/6.50/SR (1995) (urging principle reliance upon national courts and systems pursuant to principle of *aut dedere, aut judicare*); Statement of C. Shiqiu (China) to U.N.G.A. 6th Comm., U.N. GAOR, 50th Sess., at 4, U.N. Doc. A/C/6.50/SR (1995) ("[extradition] provisions appear to be contrary to the principle" of complementarity.) [hereinafter Statement of C. Shiqiu (China) to U.N.G.A. 6th Comm.].

34. Statement of C. Shiqiu (China) to U.N.G.A. 6th Comm., *supra* note 33, at 39, ¶ 207; *see also* Statement by Jamison S. Borek, Deputy Legal Adviser, United States Department of State, to U.N.G.A. 6th Comm., U.N. GAOR, 50th Sess., at 4, U.N. Doc. A/C/6/50/SR.27 (1995) [hereinafter *State Department Comments*].

35. Statement of T. Halff to the U.N.G.A. 6th Comm., U.N. GAOR, 50th Sess., at 5,6, U.N. Doc. A/C/6/50/SR (1995). Japan has specifically criticized this approach as potentially producing inconsistent results. Statement of H. Owada (Japan) to U.N.G.A. 6th Comm., U.N. GAOR, 50th Sess., at 8, U.N. Doc. A/C/6.50/SR (1995) ("further discussion is necessary in order to assess whether [application of national law] is appropriate for different national laws and definitions of crimes to result in different criminal procedures or penalties").

36. *United States Comments*, *supra* note 26, at 28, ¶ 101.

37. *Id.*

eral States complained that, as presently drafted, the Statute "stacks the deck" against objections to Court requests, and gives no guidance regarding what are even valid bases for challenging a Court or prosecutor's request for judicial assistance.³⁸ The United States Comments, for example, ask rhetorically, "Are there any circumstances where a State with a legal bar to extradition of its nationals would be required to surrender the person to the court?"³⁹ Based on these concerns, the United States has proposed that the Statute contain more specific information regarding the scope of a state's obligation to arrest and/or transfer a person to the ICC, and that the ILC Draft commentary consider encouraging a program by which States parties enter into a set of "surrender agreements."⁴⁰

The United States expressed specific concern regarding whether a State under the Draft Statute would be required to cooperate regardless of contrary requirements of domestic law, and regardless of whether cooperation may require the State to reveal sensitive information or matters of national security.⁴¹ The United States warned that:

it is not possible for States to cooperate with the court smoothly (and in some respects at all) unless these types of matters are clarified. If they are not, States will take it upon themselves to determine the extent of their obligations to cooperate, leading to what will likely be inconsistent results.⁴²

Other States have agreed that States parties should be permitted to refuse to comply with Court orders, but that the grounds for doing so should be extremely narrow. These States, for example, would exclude objections that "national authorities should not have the right to examine the warrant in relation to substantive law."⁴³ Rather, they maintain, "exceptions to the obligation to surrender . . . should be kept to the absolute minimum and they should be specifically articulated in the statute."⁴⁴ These States thus would consider inappropriate such traditional limitations or exceptions as the nationality of the accused, the level of social integration, excuses and justifications under national law, the political exception, lapse of time, or health of the accused.⁴⁵

Finally, other States have argued that the degree of national cooperation mandated by the ICC may vary depending on the nature of the assistance sought.⁴⁶ Thus, States may be required to permit the prose-

38. *Id.*

39. *Id.* at 28, ¶ 103.

40. *Id.*

41. *United States Comments*, *supra* note 26, at 26, ¶ 94.

42. *Id.* at 26-27, ¶ 95.

43. *Ad Hoc Comm. Report*, *supra* note 2, at 40, ¶ 212.

44. *Id.* ¶ 214.

45. *Id.*

46. *Ad Hoc Comm. Report*, *supra* note 2, at 42, ¶ 225.

ductor to conduct an investigation within the State's territory provided the prosecutor complied with domestic law and informed appropriate State authorities, because of the limited intrusion of State sovereignty.⁴⁷ By contrast, activities requiring more coercive measures, such as searches, property seizures, or arrest and surrender should, according to these States, be left to the prerogative of national police authorities.⁴⁸

Accordingly, while differences exist as to what specific exceptions should be permitted to a State's duty to comply with an ICC request for judicial assistance, there appears to be general agreement that those exceptions need to be set forth explicitly in the statute and that the list be exhaustive.

D. Re-Extradition, Inter-State Agreements, and Non-Functioning National Judicial Systems

Finally, States have expressed concern about the absence of provisions in the Draft Statute for granting the ICC supervisory powers where it possesses concurrent jurisdiction with a State engaged in a bona fide prosecution, or where States are unable to provide judicial assistance because their domestic law enforcement system is not functioning.

Some States noted that there may be cases in which the ICC could assist a State engaged in a bona fide investigation in obtaining the judicial assistance of other States. These States argue that because one purpose of the statute is to encourage national prosecution of alleged offenders, the statute should either include mutual judicial assistance agreements or grant the Court supervisory power to facilitate cooperation in cases in which a domestic prosecution is going forward.⁴⁹

Similarly, some States expressed concern that the Statute fails to address the issue of re-extradition, i.e., the transfer of the accused by the court to a third state. In particular, some States questioned whether it would be appropriate for the Court to act as a conduit for extradition from one State to another, where the original host State would not have permitted extradition directly to the recipient state.⁵⁰

Finally, some States expressed concern that the Statute does not account for a default procedure in cases in which the assistance of national authorities is impractical because the State does not have a functioning national judicial system.⁵¹

47. *Id.*

48. *Id.*

49. *Ad Hoc Comm. Report*, *supra* note 2, at 44, ¶ 236.

50. *Id.* at 42, ¶ 220.

51. *Id.* at 44, ¶ 236.

IV. ILA SUB-COMMITTEE WORKING GROUP ANALYSIS

To date, the ILA working group on national cooperation of the Sub-Committee on the Permanent International Criminal Court has not attempted to form a consensus on the foregoing concerns about the ILC Draft provisions on cooperation by national courts. The following thoughts, however, are offered for further consideration and discussion.

A. *Investigation*

The United States suggestion to afford States greater say in whether they will be required to assist in an investigation before the investigation begins does not appear to have generated substantial interest among other commentators. Although the suggestion has some merit, most commentators apparently are concerned that adding another layer of administrative procedure to initiating an investigation may cause unacceptable expense, delay, and interference with valid investigations.

As noted in the Working Group Report on Complementarity, an expedited "stay" proceeding may provide a viable compromise. For example, the Statute could provide that a State — upon a proper showing that an ICC request is unnecessary, inappropriate, or imposes an impermissible burden — may request an order of the Court staying the prosecutor from conducting certain objectionable parts of its investigation. The standard for granting such a stay would be high. The State would be required to show a significant likelihood that it will prevail in challenging the Court's jurisdiction or the prosecutor's request, and must show a potential for irreparable injury if the State is required to comply with the prosecutor's request. The relatively high standard of proof would likely limit attempts by States to use these challenges as a means of delaying or compromising investigations. Absent compelling reasons, an investigation could go forward until the Court had an opportunity to consider its jurisdiction.

B. *Principles Concerning State Assistance in the Apprehension, Detention, and Transfer of Suspected Criminals*

As noted, there is a wide spectrum of opinion regarding whether the Court should have separate and superior authority to compel the transfer of alleged criminals, or whether the Court should be required to rely principally upon traditional extradition arrangements. Although reasonable minds could differ on this point, States advocating principal reliance on a new "transfer" authority may have the better view. One principal function of the Statute is to assure that prosecutions of crimes against the international community will go forward notwithstanding the parochial interests of a specific state. In order for the ICC to accomplish this goal, and to assure a coordinated international response to serious international crime, the Court must have some

method of by-passing the potential obstacles created by the extradition treaties of a specific state. The ILC Draft reflects this goal, and permits the ICC to transcend the limitations of specific extradition treaties where a State has acceded to the Court's jurisdiction with respect to the crime at issue.

At present, the draft attempts to accommodate the interests of States in retaining their extradition policies by making transfer voluntary as to crimes for which a State has not acknowledged the Court's jurisdiction. To the extent that this compromise is considered inadequate, future drafts may further accommodate the concerns of States about the need to fulfill extradition treaty commitments by broadening the ICC's ability to consider treaty obligations. The ILC may, for example, wish to consider amending Article 52 to indicate that the Court, in exercising its transfer powers, may give due consideration to the national laws of the host state. The ICC would thus be expected, to the fullest extent possible, to act consistently with national law of the territorial State relating to responsibility to transfer, defenses, and other general principles of criminal law.

C. *Bases for Challenging Arrest, Extradition, or Transfer*

As noted, there appears to be a general consensus that the ILC Draft needs to enumerate the specific bases for a State to refuse to comply with a request for judicial assistance.⁵² As presently drafted, the Statute gives no guidance in identifying valid bases for challenging the Court or prosecutor's request or for otherwise resisting a Court order.⁵³ This may create enforcement problems by placing national authorities in the awkward position of either violating their domestic law or violating their treaty obligation to provide judicial assistance. Accordingly, the ILA Committee may wish to consider drafting a model set of defenses for submission to the ILC. As a starting point, the Committee may wish to consider the suggestion that the Statute exclude non-constitutional, non-fundamental, and/or discretionary bases for refusing an ICC request, such as the nationality of the accused, the level of social integration, excuses and justifications under national law, the political question doctrine, laches, or health of the accused.

D. *Supervisory and/or Default Provisions*

As noted, the Statute is silent on issues of potential concern regarding assistance by the Court where it has ceded jurisdiction to a State, or where a State is unable to provide judicial assistance because its court processes are not functioning.

A significant issue arises in cases in which the Court has been deprived of jurisdiction because of the existence of an effective and avail-

52. *United States Comments*, *supra* note 26, at 28, ¶ 101.

53. *Id.*

able domestic forum, whose efforts are frustrated by the failure of other nations to cooperate with that state. In such cases, it may be appropriate to grant the Court limited "supervisory" powers. Under such a supervisory powers clause, a State may request the assistance of the Court to command judicial assistance where that State's ability to compel the assistance of other States is inferior to that of the Court. Such a power would also resolve the question of re-extradition, as it would clarify that States have a right to expand their powers of mutual assistance to parallel that of the Court where the Court possesses concurrent jurisdiction.

Another issue concerns what measures are available to the Court in the event that the State to whom a request for judicial assistance is made does not have a functioning national judicial system. Although this is a significant concern, it may not be necessary, or more to the point, wise to attempt to address this in the Draft Statute. Presumably, in a case in which a State has deteriorated to the point where its judicial system is no longer functioning, the U.N. may consider other efforts to maintain peace and order in the region, including dispatching security forces to the State. Under these circumstances, it is not difficult to imagine that peace keeping forces could provide judicial assistance to the Court. Introducing the notion of U.N. troops to assist the Court, however, would not likely be politically wise. Accordingly, given that this is a potentially touchy subject, and the issue is likely to be resolved through extra-judicial events, it may be best not to propose any new sections or language addressing this topic.

V. CONCLUSION

The foregoing is offered as a basis for further discussion among the ILA Working Group and Committee about cooperation with national systems. As noted, despite criticisms that have been directed at the Statute's failure to fully define the principle of cooperation with national systems, the general principle appears sound, and should be encouraged with appropriate refinements.